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Attorneys for Plaintiff
CRAIG YATES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CRAIG YATES,

Plaintiff,

v.

UNION SQUARE; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN FRANCISCO UPTOWN PARKING CORPORATION; EMPORIO RULLI IL CAFFE UNION SQ.; EMPORIO RULLI IL CAFFE UNION SQ., INC.; and DOES 1 through 50, Inclusive,

Defendants.

_____/

CASE NO. C07-4087 EDL
Civil Rights

PLAINTIFF'S PARTIAL OPPOSITION TO DEFENDANT CITY OF SAN FRANCISCO UPTOWN PARKING CORPORATION'S APPLICATION TO EXTEND TIME TO "RESPOND"; DECLARATION OF TIMOTHY S. THIMESCH

INTRODUCTION

Defense counsel Martin Orlick, Esq. of JEFFERS MANGLES improperly purports to "specially appear" in federal court for defendant CITY OF SAN FRANCISCO UPTOWN PARKING CORPORATION (Uptown), and files an application to seek an extension to "respond" to the Complaint on behalf of "all defendants who have been served with process." Plaintiff partially opposes. **Plaintiff does not oppose the application to the extent it would seek a more reasonable two-week extension for the two defendants**

UPTOWN and THE CITY AND COUNTY OF SAN FRANCISCO to simply answer the Complaint (an offer already extended). However, to the extent UPTOWN and the CITY seek leave to file a delay motion against the Complaint, they have not shown good cause for their delay in pursuing same, especially concerning any purported grounds that should be obvious, as they would appear plainly on the face of the pleading. This is an ADA-Rule 56 case, and the prejudice caused by delay motions against potential resolution and/or necessary discovery is extremely disruptive and compound.

Plaintiff also opposes to the extent the application purports to seek an extension for all defendants, i.e., including the remaining defendants EMPORIO RULLI IL CAFFE UNION SQ.; EMPORIO RULLI IL CAFFE UNION SQ., INC., whom are already separately represented by another firm that has separately contacted plaintiff's counsel.

DECLARATION OF TIMOTHY S. THIMESCH

I, Timothy S. Thimesch, declare:

1. While plaintiff believes an extension of a couple of weeks to answer is proper, he believes defendants have failed entirely to show any good cause for being allowed to file a late delaying motion under FRCP Rule 12, which if allowed, will only disrupt Rule 56 procedures.

2. Defendants' purported grounds are left purposefully vague. Defendants contend simply that they need time to **"address potential conflicts [and] analyze the case."** (Emphasis added.) While the former may be addressed by the offered extension to answer, the latter involves defendants' intent to

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pursue a delaying motion, a matter which has been kept from this Court.

3. Defendants did not inform the Court that they have already made this predetermination, which has been related only to plaintiff's counsel during meet and confer: when confronted as to whether defendants were already aware of purported "defects on the face of the complaint" and whether they intended to file a motion, defense counsel responded that indeed he was, as he had success in "three different cases" filing a motion to "knock out the state causes of action." (See Plaintiff Counsel's confirmation letter at **Exhibit 1**.)

4. If this is the case, Defendants mislead by failing to inform the Court of this intent and prior experience. Obviously, defense counsel is aware that if he admitted he was already aware of the purported defect (and had prior motion experience challenging it), he would face scrutiny as to why his client had not filed on time. Instead, defendants attempt to mislead the court with the assertion that they still need time to "analyze." This is simply just false and misleading.

5. There is no great mystery as to the type of motion defendants intend to file, which would be frivolous in all extents within the circumstances of the present case. The three motions defense counsel has experience in "knocking out state causes of action" are all venued in U.S. District Court for the Southern District of California where three judges have effectively created a moratorium in the Southern District against state disabled rights claims under the Unruh Civil Rights Act and Disabled Rights Act, Civil Code Sections 52 and

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54.3, i.e., through declining to exercise supplemental jurisdiction on grounds of novel or complex state law. (See Mr. Orlicks' subject involvement in Cross v. Boston Mkt. Corp., 2007 U.S. Dist. LEXIS 39407, *7 (S.D. Cal. 2007 (J. Jones)); Cross v. Pac. Coast Plaza Invs., L.P., 2007 U.S. Dist. LEXIS 17793, *10 (D. Cal. 2007; J. Miller); Cross v. Pac. Coast Plaza Invs., L.P., 2007 U.S. Dist. LEXIS 16138, *18 (D. Cal. 2007; J. Miller); see also, non-Orlick case: Kohler v. Mira Mesa Marketplace W., LLC, 2007 U.S. Dist. LEXIS 40632, *8 (D. Cal. 2007 (J. Hayes).)

6. Note that all of the judges of the U.S. District Court for the Eastern District of California have taken strong exception to these decisions and their purported findings of novelty. (See, e.g., Wilson v. Haria & Gogri Corp., 479 F. Supp. 2d 1127, 1138, ftn. 15 (E.D. Cal. 2007).)

7. Such a motion by defendants in the instant case would be frivolous. First, the court will find this case does indeed involve "intent," so the grounds in the three Cross cases are not applicable here. Defendants have purposefully re-built their multi-million dollar facilities inaccessible. (Gunther v. Lin, 144 Cal. App. 4th 223, 228 (Cal. Ct. App. 2006) **("Some of the ADAAG's are basically so intuitive and obvious – such as requiring the doors to at least one stall in a public restroom to be wide enough to allow a wheelchair to pass through [footnote omitted] – that it would be hard to believe that noncompliance with them could be other than intentional.")**

8. More importantly, this is a Title II case involving governmental action and a federal-statutorily based ADA-damage

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claim. Unlike the three Cross cases involving Title III, which has no federal damage counterpart, and which involved a damage claim only under state law, plaintiff's damage claim cannot be completely severed from the case. Any severance would effectively require plaintiff to pursue identically fact-based claims in two different courts, to his extreme prejudice.

9. Finally, when, within meet and confer, defense counsel was challenged as to why he needed extra time when he's pursued this motion on three prior occasions, defense counsel responded that he needed time to "research material" available from his client from which he would purport to ask the Court to "take judicial notice of." Plaintiff's counsel understood that this material relates to "pre-litigation plans," and that defendants intend to use the material to claim that some violations are "moot."

10. Such a claim would be frivolous. "Pre-litigation plans" do not provide grounds for claiming mootness. Further, defendants own self-serving documents would not be proper grounds for requesting "judicial notice," especially in a Rule 56 case where plaintiff will prejudicially denied the prior right to test defendants' assertions through discovery. (The Court will also find after discovery has completed that defendants spent millions of dollars rebuilding the garage and square in a condition that is inaccessible and excludes plaintiff, and that both the Mayor and other City officials ignored plaintiff's pre-litigation efforts to resolve the applicable barriers at the Square. They even ignored such requests within plaintiff's Government Claim.)

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11. Next, defendants claim that "[b]y extending the time for Defendants to respond, the parties will be able to focus their resources on attempts to evaluate the alleged access violations and possibly resolve the case." Quite the opposite, the motions will prevent cooperative resolution. Defendants' delay in filing the motion will delay the at-issue status and Rule 56 inspections, and will only prompt plaintiff to request relief from Rule 56's administrative procedures to pursue discovery on the motion's questionable "judicial notice" issues. Further, as is typical, we can expect defendants to obstruct settlement of damages in the Rule 56 conferences by citing to the "merits" of pending motions to sever.

12. Plaintiff's counsel will be extra-cautious throughout the litigation in entertaining Mr. Orlick's assertion of desire to "possibly resolve the case." He is extra-familiar with Mr. Orlick's well-known penchant for inflammatory in ADA cases, i.e., by personally attacking any plaintiff, such as Mr. Yates, with a history of prior participation in Civil Rights litigation. Repeatedly we have seen his resort to name-calling against such plaintiffs and their counsel, i.e., such as "professional plaintiff" and references to "a cottage industry" and the like. (See, e.g., Cross v. Pac. Coast Plaza Invs., L.P., supra, 2007 U.S. Dist. LEXIS 21163 at *8.)

13. Of course this conduct was never proper, and we now have a recent Ninth Circuit decision responding to such name-calling, and defending the general necessity of ardent ADA advocacy. (See Molski v. Evergreen Dynasty Corp., — F.3d —, 2007 U.S. App. LEXIS 20966 (9th Cir. 2007) **("For the ADA to yield its**

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promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA.")

14. Last, both Uptown and the City have made no attempt to explain why they waited until the last second to retain counsel, especially if there was such an obvious conflict (both Uptown and the City were served through offices of their legal counsel). If they had trouble retaining counsel, this should have been reflected in their declarations. For all this Court and plaintiff's counsel knows, the defendants simply waited until the last second. While flexibility may generally be accorded this situation for extending the time to Answer, far greater good cause should be shown for pursuing late delay motions.

15. That defendants perhaps misconceive the necessity of showing good cause is reflected by their ex parte, where they consistently refer to filing a late delaying motion **as a "right" they "cannot waive."** (Orlick Decl at p. 2, ¶6.) To be clear, defendants need to be told that unless they file on time, or take better efforts to show good cause, there is no right to file late, and the motion will be deemed waived.

Dated: September 4, 2007

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CRAIG YATES

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Certificate or Proof of Service by Mail, Fax or Personal Delivery

State of California

County of Contra Costa } ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the Counties of Contra Costa, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is Thimesch Law Offices, 158 Hilltop Crescent, Walnut Creek, California 94597-3452; that on the below date, following normal business practice, I caused to be served the foregoing document described as:

PLAINTIFF'S PARTIAL OPPOSITION TO DEFENDANT CITY OF SAN FRANCISCO UPTOWN PARKING CORPORATION'S APPLICATION TO EXTEND TIME TO "RESPOND"

Yates v. City and County of San Francisco, et al. (U.S. District Court for the N. Dist. of Calif., Case No. C07-4087 EDL)

on the interested parties in this action, by taking a true copy thereof and conveying as follows:

JEFFER, MANGELS, BUTLER & MARMARO LLP
MARTIN H. ORLICK, ESQ.
Two Embarcadero Center, 5th Floor
San Francisco, CA 94111
Telephone: 415/398-8080
Facsimile: 415/398-5584
mho@jmbm.com

❑ **See Attached Service List.**

❑ **Personal Delivery:** By personally delivering, or causing to be hand delivered through a fax-filing or messenger agency, true and exact copies of these documents to the above entitled place of business (or as indicated on the attached service list) with directions to deliver them immediately to _____.

☑ **Email:** By email transmission with a copy of the subject document in Portable Document Format (PDF), sent to the below designated email addresses, and with a request for received- and read-receipts. **(❑ Without exhibits, which are to follow by overnight mail; ☑ With exhibits; ❑ N/A)**

☑ **Facsimile:** By facsimile transmission, from our regular facsimile machine at (888) 210-8868, at approximately 2 PM, or soon thereafter, addressed to the following facsimile machine **(❑ Without exhibits, which are to follow by mail; ☑ With exhibits):**

Name of Person Served: See Above
Facsimile Telephone No: See Above

A facsimile machine report was printed immediately thereafter, which verified that the transmission was complete and without error.

☑ **U.S. Mail and/or Overnight:** By depositing true copies thereof, enclosed in a sealed envelope(s) with postage thereon fully prepaid, marked with the above address(es), and placed in:

☑ in First Class United States Mail
❑ in ❑ priority, or ❑ standard, overnight mail via Federal Express,

I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence, including said envelope, will be deposited with the United States Postal Service in Walnut Creek, and designated overnight packages will be timely scheduled for pickup or placed in Federal Express drop boxes or left at drop centers in Walnut Creek.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that the foregoing is true and correct under penalty of perjury pursuant to the laws of the United States and the state of California. Executed this **September 4, 2007**, in Walnut Creek, California.

By: _____
❑ Timothy S. Thimesch
(Original signed)

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Timothy Thimesch

From: Timothy Thimesch [tim@thimeschlaw.com]
Sent: Thursday, August 30, 2007 4:06 PM
To: 'Martin H. Orlick Esq. (mho@jmbm.com)'; 'df1@jmbm.com'
Cc: 'Gene Farber'
Subject: Yates v. Union Square (Your "Ex Parte")
Contacts: Martin H. Orlick Esq.

Dear Mr. Orlick:

I checked both email and Pacer, and found no notice of the “ex parte” you mentioned had already been filed earlier today. Please send it to me right away.

If you haven’t yet filed the application, please make sure it represents that plaintiff opposes an extension in this Rule 56 case to bring motions that should be evident on the face of the complaint, and that plaintiff finds frivolous defendants’ suggestion that the state causes of action should be “knocked out”. Also, if your firm has experience in filing this very motion against the state cause of actions, as you represent, it should be able to file on time. Otherwise, these motions will only serve to delay Rule 56 procedures. Please also represent to the Court that plaintiff’s offer of a two week extension to resolve conflicts and answer was declined.

Sincerely,

Tim Thimesch